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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-309

TREASURE VALLEY POTATO BARGAINING ASSOCIATION, ET AL.,
Petitioners,

v.

ORE-IDA FOODS, INC. AND J. R. SIMPLOT COMPANY,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
A. Nature of the Case	2
B. Proceedings in the Courts Below	4
ARGUMENT	
This Court Should Not Grant A Writ of Certiorari To Review Factual Determinations Affirmed By The Court Of Appeals	6
A. The District Court Did Not Exclude Any Evidence In Making Its Findings	7
B. The District Court Did Not Disregard Any Evidence	7
C. The Court of Appeals Did Not Hold Any Finding Of The District Court To Be Clearly Erroneous	9
D. The Decision Of The Court Of Appeals Is Not In Conflict With This Court's Ruling in *United States* v. *Container Corp. of America*	9
E. The Decisions Below Will Not Undermine The Force And Policy Of Section 2 Of The Sherman Act	13
CONCLUSION	14

CITATIONS

Cases: Page

Belliston v. *Texaco, Inc.*, 455 F.2d 175 (10th Cir. 1972), *cert. denied*, 408 U.S. 928 (1972) 11

Continental Ore v. *Union Carbide Corp.*, 370 U.S. 690 (1962) 7

Esco Corp. v. *United States*, 340 F.2d 1000, 1007 (9th Cir. 1965) 10

Gray v. *Shell Oil Company*, 469 F.2d 742 (9th Cir. 1972), *cert. denied*, 412 U.S. 943 (1973) 11

Interstate Circuit, Inc. v. *United States*, 306 U.S. 208 (1939) 7, 8

Manderville Island Farms, Inc. v. *American Crystal Sugar Co.*, 334 U.S. 219 (1948) 14

United States v. *Container Corp. of America*, 393 U.S. 333 (1969) 10, 11, 12

Statutes:

Sherman Act

Section 1, 15 U.S.C. § 1 2

Section 2, 15 U.S.C. § 2 ..... 2, 13, 14

Clayton Act

Section 6 12

Rules:

Federal Rules of Civil Procedure

Rule 52 2

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OPINIONS BELOW

The District Court's findings of fact, conclusions of law and judgment are reported at 1973 CCH Trade Cases ¶ 74,315. The opinion of the United States Court of Appeals for the Ninth Circuit affirming the judgment of the District Court is reported at 497 F.2d 203. On June 24, 1974 the Court of Appeals denied a petition for rehearing and suggestion for rehearing en banc without opinion.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition (Pet. 2).

QUESTIONS PRESENTED

Should this Court review the facts of this case to determine whether the District Court's findings of facts were clearly erroneous, where the Court of Appeals has carefully reviewed the District Court's findings and has held unanimously that the findings were not clearly erroneous?

STATUTES INVOLVED

Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1, 2) and Rule 52 of the Federal Rules of Civil Procedure, which are here involved, are reproduced at pages 4-5 of the Petition.

STATEMENT OF THE CASE

A. Nature of the Case

This is a private antitrust action concerning raw potatoes purchased by the defendants under pre-season contract from approximately 40 growers located in an eleven-county area of Idaho and Oregon.

The suit was instituted in December, 1966 by two bargaining associations of potato growers—Treasure Valley Potato Bargaining Association ("Treasure Valley Ass'n") and Malheur Potato Bargaining Association ("Malheur Ass'n")—and a small group of their members. Plaintiffs brought the case as a class action, alleging that they represented all potato growers in ten southwestern counties of Idaho and neighboring Malheur County in Oregon who sold raw potatoes to either defendant potato processor pursuant to pre-season contracts in the

years 1963 through 1966 (R. 1, 6744-45).[1] However, before trial, the District Court dismissed the two bargaining associations on the ground they lacked capacity to sue (R. 6754-56). Of the approximately 600 potato growers served with notice of the pendency of the action, about 40 elected to become class members (R. 7565, 8665).

Defendants are two potato processors: Ore-Ida Foods, Inc. ("Ore-Ida") which has a processing plant in Ontario, Oregon, and J. R. Simplot Company ("Simplot") which has a processing plant in Caldwell, Idaho. Ore-Ida and Simplot, as well as the other processors in the area, purchased their raw potato requirements both in the open market after harvest and under pre-season contracts (Findings 8-9; App. 8). A pre-season contract is an agreement under which the grower agrees to raise potatoes on specified acreage for delivery to the buyer at or after harvest (Finding 10; App. 8-9). The price and other terms of pre-season contracts are negotiated early in the year, before planting (*Id.*). Pre-season contracts have significant advantages for both growers and processors (Finding 11; App. 9-10; 497 F.2d at 206 n.1).

Members of the Treasure Valley and Malheur Associations are prohibited by their membership agreements from selling their potatoes under pre-season contract except at the prices and on the terms approved by their bargaining associations (Findings 3-4; App. 6). Accordingly, the processors must meet with the representatives of each bargaining association to negotiate the terms for a pre-season contract acceptable to the association's membership. This case concerns the annual negotiations of the Malheur and Treasure Valley Associations with Ore-Ida and Simplot during the years 1963 through 1966.

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[1] "R." refers to record on appeal in the Court of Appeals. "Pet." refers to the petition for a writ of certiorari. "App." refers to the Appendix to the petition. The District Court's findings of fact will be cited to the Appendix as well as by number.

As the Court of Appeals said, "The basic factual issue . . . is why the pre-season contracts negotiated by the bargaining associations with Simplot, on the one hand, and Ore-Ida, on the other, contain similar price terms" (497 F.2d at 207). Plaintiffs alleged that the similarity in contract price resulted from an illegal combination and conspiracy between the two processors, whereas the defendant processors maintained that such similarities resulted from the concerted bargaining activities of the two bargaining associations and from natural market forces.

B. Proceedings in the Courts Below

The case was tried without a jury before Judge Ray McNichols in the District Court for the District of Idaho. Over the course of four weeks the parties submitted live testimony and introduced more than 400 exhibits, principally directed at reconstructing the pre-season contract negotiations during the relevant time.[2]

At the conclusion of trial, the District Judge orally announced his findings and conclusions from which extensive written findings of fact were drawn. Commenting specifically on the importance of assessing the credibility of witnesses (App. 4), the Court found that plaintiffs had failed to carry their burden of proof (Finding 23; App. 16). On the critical issue of the reason for contract similarity, the Court found, on the basis of "all the evidence" as well as "all the inferences that may reasonably be drawn therefrom," that defendants did not conspire, combine or agree on the prices to be paid for potatoes under pre-season contract (Findings 23-25; App. 16-17).

[2] Despite petitioners' attempt to resurrect issues which were dismissed out of the case at a preliminary stage, there was no evidence offered to support the allegations that defendants (a) discriminated against growers who refused to purchase seed or fertilizer from defendants; (b) fixed the price of processed potatoes; or (c) acquired land for the purpose of driving independent growers out of business. (497 F.2d at 207 n.3)

On the other hand, the defendants established through clear and convincing evidence, including the admissions of plaintiffs, that the similarity in contract terms resulted from the concerted activity of the two associations. The Court found conclusive the evidence showing that the two bargaining associations in negotiations "actively worked together, exchanged information and held out together for a single base price and similar contract terms" (Finding 34; App. 22). This activity, the Court found, was the "controlling reason" for any similarity in contract terms (*Id.*).

On the remaining issues, the Court found that "[n]either defendant possessed monopoly power in any relevant market or geographic area" and that defendants "did not individually or collectively have the intention, nor did either attempt, to achieve, exercise or maintain any such power" (Finding 33; App. 21-22). There was "no allocation of growers among or by the defendants" (Finding 17; App. 12). On the claim that defendants boycotted four officers of Treasure Valley Ass'n, the District Court noted that the testimony of those officers "did not hold up under cross-examination" (Finding 30; App. 20).

Plaintiffs appealed on the grounds that the findings of the District Court were clearly erroneous. The Ninth Circuit Court of Appeals reviewed the record and unanimously affirmed the District Court. A petition for rehearing asserted for the first time an argument that the District Court excluded or disregarded evidence of plaintiffs'. The petition was summarily denied and plaintiffs' suggestion that there be an en banc hearing was rejected unanimously (App. 62).

ARGUMENT

THIS COURT SHOULD NOT GRANT A WRIT OF CERTIORARI TO REVIEW FACTUAL DETERMINATIONS AFFIRMED BY THE COURT OF APPEALS

No matter how petitioners couch the issues, this case inevitably turns on its facts. Regrettably, the Petition does not distinguish between the facts in evidence and plaintiffs' claims or allegations which, because they were unsupported by evidence, were rejected both at trial and on appeal. Moreover, the Petition does not attempt to deal with the record as a whole. Conspicuous by its absence is any attempt by petitioners to deal with "plaintiffs' admission that the bargaining associations actively strived to obtain similar contracts," which the Court of Appeals held "supports the finding that the activity of the bargaining associations, not of Simplot and Ore-Ida, was the controlling reason for the similarity of price and contract terms" (497 F.2d at 208).

The facts, as found by the District Court after almost four years of discovery and a long trial, are complex and peculiar to the special circumstances surrounding the bargaining for pre-season potato contracts in the eleven-county area between 1963 and 1966. As the Court of Appeals found, the District Court "liberally received abundant quantities of documentary evidence and oral evidence . . . the court held that Simplot and Ore-Ida did not directly or indirectly, expressly or impliedly, enter into any agreement in restraint of trade, and they did not monopolize or attempt to monopolize" (497 F.2d at 207). It is submitted that a writ of certiorari ought not to be granted to review factual determinations where two courts have considered the same record and have reached the same conclusion.

A. The District Court Did Not Exclude Any Evidence In Making Its Findings.

Petitioners imply, without record citation, that direct evidence of price discussions was "excluded" by the District Court (Pet. 15); and place primary reliance on cases, such as *Continental Ore* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962), where exclusion of evidence was held to be error. This argument, however, wholly dissolves in the simple fact that *no evidence was excluded by the trial court.*

At page 14 of the Petition, petitioners', citing to *Continental Ore*, where evidence was actually excluded, claim only that their evidence was "disregarded," see line 8 and again line 16 of the full paragraph beginning on that page. And in the second full paragraph on page 16 and again in the last line of page 13 they refer to "excluded (disregarded) evidence." Thus, petitioners appear to mean "disregarded" when they say "excluded;" and appear to consider evidence disregarded as synonymous with the Court declining to accept their claimed inference.

Petitioners cite to no evidence that the District Court excluded, nor did they do so in the Court of Appeals; and in fact there was none.

B. The District Court Did Not Disregard Any Evidence.

In their brief before the Court of Appeals, petitioners argued the District Court had applied an erroneous legal standard under which plaintiffs' circumstantial evidence was allegedly disregarded as insufficient to prove a violation of the Sherman Act (Appellants' Brief, pp. 36-39). The Court of Appeals acknowledged the holding in *Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208, "that circumstantial evidence may suffice" to prove conspiracy; but it also noted that in *Interstate* this "Court acknowl-

edged that powerful circumstantial evidence of conspiracy could be rebutted by direct testimony of the alleged conspirators" (497 F.2d at 208). However, the Court of Appeals further found that "the trial judge correctly understood the teachings of *Interstate Circuit*. . . ." The Court correctly noted that the District Court did not disregard plaintiffs' evidence, but rather found that the inferences urged from such evidence were completely rebutted (497 F.2d at 208).

The Petition recycles the same argument, asserting that the trial court "disregarded" the direct evidence of price discussions between defendants (Pet. 14-15). Plaintiffs do not cite a single fact or point to a single piece of evidence which the trial court supposedly disregarded.[*] On the contrary, the findings of the District Court specifically commented on the evidence offered by plaintiffs, which, if unrebutted, could have permitted an inference of collusive price fixing (Findings 25-27; App. 17, 18). But by oral and written evidence such inferences were conclusively disproved.

Findings 25 and 27 of the District Court (App. 17, 18) leave no room for doubt that all of the evidence was considered. No evidence was excluded or disregarded; only the inferences urged by plaintiffs from such evidence were rejected. As stated by the Court of Appeals, the trial court's decision was based "on *all* the evidence in the case, and from the *inferences* that reasonably flow therefrom" (497 F.2d at 208; emphasis by the Court).

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[*] The District Court's finding 22 is: "The Court was liberal in the reception of evidence addressed to all charges tried. It permitted evidence relating to the conduct of the defendants in all areas of their operations whether or not directly related to raw potato procurement . . . . This evidence was received and evaluated to determine whether it, combined with that more directly related to the subject matter and time period, would provide inferences to support the charges of the Second Amended Complaint" (App. 15).

C. The Court of Appeals Did Not Hold Any Finding Of The District Court To Be Clearly Erroneous.

Petitioners' next major inaccuracy is their assertion that the language of the Court of Appeals' footnote 4 (497 F.2d at 208 n.4) is a ruling that the District Court committed clear error by concluding that defendants "did not even discuss prices with each other in relation to their dealings with plaintiffs" (Pet. 3, 11).[1]

This is not what the Court said: In footnote 4 the Court allowed for the possibility that the finding as regards discussion of prices "may be wrong" (497 F.2d at 208 n.4). The Court expressly did not reach the issue of whether the finding was clearly erroneous, because there was no need to do so (*Id.*). As discussed below, in view of the District Court's correct finding that there was no price agreement between defendants (497 F.2d at 208 n.4), the Court of Appeals properly affirmed the District Court's judgment holding that defendants did not violate Section 1 of the Sherman Act.

D. The Decision Of The Court Of Appeals Is Not In Conflict With This Court's Ruling In *United States* v. *Container Corp. of America.*

Since this is not the appropriate forum for relitigation of factual disputes, and since plaintiffs refer to no evidence they claim supports a finding of conspiracy, we will not belabor the Court with an analysis of plaintiffs' evidence at trial from which it urges that an inference of price agreement was compelled. (Petitioners' contentions on this point are set forth at pages 36-39 of their brief in the Court of Appeals, and the evidence rebutting each such factual allegation is set

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[1] The finding of the District Court was "that none of the officers or employees of either defendant ever discussed or agreed upon the price that either or both *would pay* for raw potatoes" (Finding 29; App. 19-20; emphasis added).

forth at pages 30-39 of defendants' brief in the Court of Appeals.) Taking *only* the evidence most favorable to plaintiffs, however, the record shows, at most, some casual price discussions, never relating to prices "that either or both [of the processors] *would pay* for raw potatoes" (Finding 29; App. 20; emphasis added). The reference in the Petition to "evidence that competitors routinely exchanged price information resulting in exact price identity" (Pet. 16), bearing no citation to the record, must be categorized as adversarial hyperbole.[5]

Price discussion is not price agreement. Price agreement is the indispensible ingredient of a price-fixing violation. See, *e.g.*, *Esco Corp.* v. *United States*, 340 F.2d 1000, 1007 (9th Cir. 1965). The District Court specifically found that there was no agreement between defendants to fix, stabilize, or affect potato prices, and the Court of Appeals expressly held that this finding was not clearly erroneous (497 F.2d at 208).

Petitioners claim that a finding of price-fixing is, nevertheless, compelled by this Court's decision in *United States* v. *Container Corp. of America*, 393 U.S. 333 (1969), on the theory that any exchange of price information is *per se* illegal. In disposing of this contention, the Court of Appeals noted, "flaws fill this argument." The Court observed that *Container* "involved more than a mere exchange of price information; it involved

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[5] Finding 27 is in part: "The contacts and communications between employees and officers of the defendants which are relied upon by the plaintiffs to show a violation of the antitrust laws do not support any inference of an agreement violative of the antitrust laws. They were for proper purposes, were not anticompetitive, and had neither the purpose nor the effect of an agreement . . . to fix or stabilize potato prices . . . (App. 18-19). Finding 28 is in part: "Information of the sort which plaintiffs contend was the subject matter of conspiratorial communications between defendants was in fact common knowledge in the relevant geographic area and was freely passed back and forth among members of the community interested in potato prices . . . (App. 19).

an *agreement* to exchange price information whenever requested" (497 F.2d at 208; emphasis by the Court). Here the District Court found, with ample support in the record, that there was no agreement between defendants, either to exchange price information or to fix the prices they would pay for potatoes under pre-season contracts (*Id*).[6]

Plaintiffs persist in their argument that "*Container* did *not* involve an underlying agreement to exchange the prices" (Pet. 19). In spite of this Court's statement that "the essence of the *agreement* was to furnish price information whenever requested" (393 U.S. at 335; emphasis added), petitioners argue that this Court found no agreement in *Container*.

The argument that petitioners make now as to the construction of the *Container* decision is the same argument that their counsel made to, and which was rejected by, both the Ninth Circuit in *Gray* v. *Shell Oil Company*, 469 F.2d 742 (9th Cir. 1972), *cert. denied*, 412 U.S. 943 (1973), and by the Tenth Circuit in *Bellis-ton* v. *Texaco, Inc.*, 455 F.2d 175 (10th Cir. 1972), *cert. denied*, 408 U.S. 928 (1972). As stated in the *Gray* case: "Appellants' reliance on *Container* is misplaced . . . . [T]here is no question but that the Supreme Court found an 'agreement' existed between the defendants to exchange price information" (469 F.2d at 746). On both occasions, this Court denied certiorari.

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[6] The Court of Appeals, in rejecting plaintiffs' reliance on *Container*, remarked that the District Court implicitly found that this case did not present an agreement of the kind that existed in *Container* (497 F.2d at 209). This was not, as plaintiffs argue, a new finding made by the appellate court to support affirmance but rather was a comment, made in the course of distinguishing *Container*, which logically flowed from and was embodied in other findings, particularly the findings addressed to the nature and effect of the contacts and communications between defendants' employees (Finding 27; App. 18-19).

The Petition refers to "the exchange of price information by competitors" (Pet. 19) as if this were a fact of record, without citing to a shred of evidence that either defendant ever exchanged any price information to the other. And they cite no such evidence because there is none. Even indulging their assumption, however, petitioners' argument fails by its own terms because they necessarily limit their contention to a price exchange "that leads to price stabilization" (Pet. 19). The uncontroverted facts, found by the District Court and expressly upheld by the Court of Appeals, are that the price stabilization and similarity of contract terms here were caused by the conspiratorial activity of the *plaintiffs.*[7] Accodingly, the Court of Appeals stated, "had there been such an agreement [on the part of the processors], even then we would not apply *Container Corp.*" because any such agreement between the defendants "to exchange price data would therefore have had no substantial causal effect on pre-season contracts" (497 F.2d at 209). The Court was clearly correct on this point, and the Petition does not contend otherwise.

The *Container* issue is simply a red herring; the evidence is conclusive and both the District Court and the Court of Appeals found that the similarity of price and terms of the contracts was caused by the collusive activities of the growers and their bargaining associations.

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[7] The District Court properly found to be true the counterclaim charges that the bargaining associations engaged in price fixing activity which, "was the controlling reason for the similarity of price and contract terms . . ." (Finding 34; App. 22). The District Court, however, held that such activities by agricultural organizations were immunized from Sherman Act accountability by reason of Section 6 of the Clayton Act; and the Court of Appeals affirmed that ruling.

E. The Decision Below Will Not Undermine The Force And Policy Of Section 2 Of The Sherman Act.

Petitioners also attempt to relitigate the facts which underlay the decisions of two courts that "neither defendant possessed monopoly power in any relevant market or geographic area (Finding 33; App. 21; 497 F.2d at 209-10). Remarkably, after years of pretrial proceedings, a long trial, an appeal and a petition for rehearing, plaintiffs present a factual argument which is virtually identical to that made in their pretrial brief; and without record citations to support their alleged "facts." What petitioners put forth, in urging this Court to hold the District Court's findings "clearly erroneous," are not facts, they are not based on evidence, but are merely allegations which were not proved and remain untrue.

The evidence showed beyond question that growers had sales outlets available other than the defendants (Finding 8; App. 8). That evidence, including admissions by several plaintiffs, is summarized at pages 42 through 47 of defendants' brief in the Court of Appeals and is commented on by the Court of Appeals (497 F.2d at 209). The Petition refers only to some unspecified "evidence introduced by plaintiffs" to the contrary, for which again no record citation is given.

Petitioners then make a number of factual contentions, none of which is supported by evidence, and all of which were rejected by the District Court on ample evidence. For example, petitioners talk about "defendants' boycott of the growers' association officers" (Pet. 26); the District Court found that the testimony of those officers, elicited in support of the allegation "did not hold up under cross-examination" and was "not persuasive" (Finding 30; App. 20). Petitioners rely on a charge of "discriminatory prices with regard to association members" (Pet. 26); no evidence was even offered of that claim nor was it urged below. Petitioners' accusation of "defendants' at-

tempts to force plaintiffs into selling their land to them at extremely depressed prices through coercion and leverage" (Pet. 24) is no more than the charge raised in the complaint as to which summary judgment was entered in favor of the defendants and from which no appeal was even taken (Finding, Third para., App. 3).

Notwithstanding the loose allegations of the Petition, the fact remains that plaintiffs never established the most basic elements of a Section 2 violation: Monopoly power or the specific intent to acquire such power (497 F.2d at 209-10). The market setting, including the many alternative sales outlets, and the economic realities of this case—including the fact that no potato growers in the country received a higher price for their product than plaintiffs (497 F.2d at 209)—do not resemble the facts of *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219 (1948).

The decisions of the Courts below do not conflict in any way with the precedents established under Section 2 of the Sherman Act, nor is the force of Section 2 undermined. There is no cause for permitting petitioners to relitigate their Section 2 allegations in this Court.

CONCLUSION

The parties to this litigation have argued and briefed the facts of this case repeatedly, first at trial, then on appeal to a panel of the Ninth Circuit, and finally on petition for rehearing to the full Court of Appeals. The result has always been the same and has been unanimous. The facts of the case have not changed, nor have the arguments of petitioners. There is no significant legal principle in issue. Consistent with this Court's practice

of declining to be a forum for factual disputes, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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